GHAZI VEGETABLE GHEE & OIL MILLS LTD *a*

v.

RAZIK FAREED INTERNATIONAL (M) SDN BHD

COURT OF APPEAL, KUALA LUMPUR *b*
SHAIK DAUD ISMAIL JCA
DENIS ONG JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: W-04-18-1997]
10 MAY 2003 *c*

ARBITRATION: *Award - Setting aside - Contracts for purchase of palm oil - Failure of arbitrators to construe contract - Whether an error of law apparent on face of award - Whether award improperly procured - Whether to be set aside - Arbitration Act 1952, s. 24(1)*

d

By three contracts executed on 21 October 1993, the appellant agreed to purchase 6000 metric tons of RDB palm oil from the respondent. Subsequently, irrevocable letters of guarantee were opened by the appellant in respect of the first two contracts. The respondent made partial shipments of the palm oil under the first two contracts, but was unable to ship out the balance. The respondent's failures notwithstanding, the appellant extended the shipment dates thereof. However, before the expiry of the extended shipment dates, the appellant revoked the letters of guarantee and stopped payment of all monies due to the respondent. The respondent took the stand that the appellant had terminated the contracts, and so refused to make further shipments to the appellant. At the ensuing arbitration of the disputes, the arbitrators faulted the respondent for the breach of the contracts, and in the event gave an award to the appellant. The arbitrators' award was affirmed by the Appeal Board of the Palm Oil Refiners Association of Malaysia whereupon the respondent appealed. At the hearing in the High Court below, the learned judge took the view that there was an error of law apparent on the face of the award, and in the event set aside the award. This was the appellant's appeal against the said decision. *e* *f* *g*

Held:
Per Haidar Mohd Noor JCA

[1] The arbitrators as well as the Appeal Board failed to consider or adequately consider the legal significance of the appellant's conduct in revoking the irrevocable letter of credit given that there was an extension of time for the respondent to fulfill its obligations to ship and that time had not lapsed. (p 696 g-h) *h*

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[2] The appellant by stopping the payment had committed a breach and had repudiated the contract. The conduct of the respondent pointed to the acceptance of the repudiation by the appellant. (p 697 a)

[2a] The issue of whether there was repudiation of the contracts or not was not considered or adequately considered by the arbitrators or the said Appeal Board. Similarly, the issue of whether time for completion of the contract is no longer of the essence of the contracts was not addressed or adequately addressed by the arbitrators or the Appeal Board. (p 697 d)

[3] There was no error of law or fact committed by the learned judge in making an order setting aside the award of the arbitrators. Further, the learned judge was correct in following the principle laid down in *AG of Singapore v. Wong Sai Cheng* and applying it to the facts of this case. (p 697 e)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes*

Melalui tiga perjanjian bertarikh 21 Oktober 1993, perayu bersetuju untuk membeli 6000 metrik tan minyak sawit RDB dari responden. Berikutnya, surat-surat kredit tak boleh batal telah dikeluarkan oleh perayu untuk perjanjian pertama dan kedua tersebut. Responden membuat sebahagian penghantaran minyak sawit di bawah perjanjian pertama dan kedua, tetapi gagal menghantar bakinya. Walaupun begitu, tarikh bagi penghantaran tersebut telah dilanjutkan oleh perayu. Namun, sebelum tarikh yang dilanjutkan tersebut berakhir, perayu membatalkan surat-surat kredit di atas dan memberhentikan segala pembayaran yang terakru kepada responden. Responden menganggap perbuatan perayu sebagai menamatkan segala perjanjian, dan dengan itu enggan membuat penghantaran-penghantaran kepada perayu. Pada sesi timbang tara yang menyusul, penimbangtara-penimbangtara telah mempersalahkan responden kerana melanggar perjanjian, dan oleh itu membuat award yang berpihak kepada perayu. Award tersebut kemudiannya disahkan oleh Lembaga Rayuan Persatuan Pengilang-Pengilang Minyak Sawit Malaysia, sekaligus mencetuskan rayuan oleh responden. Pada pendengaran di Mahkamah Tinggi di bawah, hakim yang bijaksana mengambil pandangan bahawa asas pemberian award telah dicemari oleh kekhilafan undang-undang, dan dengan itu telah mengetepikan award. Ini adalah rayuan perayu terhadap keputusan tersebut.

Diputuskan:
Oleh Haidar Mohd Noor HMR

[1] Penimbangtara-penimbangtara serta Lembaga Rayuan gagal mempertimbang atau mempertimbangkan secukupnya signifikasi undang-undang berkenaan tingkahlaku perayu dalam membatalkan surat-surat kredit di sini, mengambilkira bahawa terdapat perlanjutan masa bagi responden menunaikan obligasinya untuk membuat penghantaran di mana perlanjutan masa tersebut masih belum luput.

[2] Perayu dengan memberhentikan pembayaran telah melakukan pelanggaran dan telah menolak perjanjian. Tingkahlaku responden pula memperlihatkan bahawa ia menerima penolakan perjanjian oleh perayu tersebut.

[2a] Isu sama ada wujud penolakan perjanjian tidak dipertimbang atau dipertimbang dengan secukupnya oleh penimbangtara-penimbangtara mahupun Lembaga Rayuan. Begitu juga, isu sama ada masa untuk menyempurnakan perjanjian masih merupakan intipati perjanjian tidak diambilkira atau diberi perhatian yang secukupnya oleh penimbangtara-penimbangtara atau Lembaga Rayuan.

[3] Hakim yang bijaksana tidak melakukan apa-apa kekhilafan undang-undang atau fakta dalam mengetepikan award penimbangtara-penimbangtara. Selanjutnya, hakim yang bijaksana adalah betul apabila mengikuti prinsip yang dibentang dalam kes *AG of Singapore v. Wong Sai Cheng* dan menggunapakaikannya kepada fakta-fakta di sini.

Rayuan ditolak.]

Case(s) referred to:
AG of Singapore v. Wong Sai Cheng [1980] 1 MLJ 131 ***(refd)***

Legislation referred to:
Arbitration Act 1952, s. 24(1)
Courts of Judicature Act 1964, s. 42

For the appellant - Shahul Hameed Amirudin (T Kuhendran); M/s Zul Rafique & Partners
For the respondent - Thakurdas Jethwani (Sonia Shah); M/s Thakurdas Jethwani & Co

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R2-25-48-96]

Reported by WA Sharif

JUDGMENT

Haidar Mohd Noor JCA:

This appeal is against the judgment of the learned judge in the court below, who allowed the application of the respondent by way of notice of originating motion by setting aside the arbitration award published on 12 April 1996 of the Appeal Board of the Palm Oil Refiners Association of Malaysia (PORAM) and the award of the arbitrators dated 22 November 1995 (duly accepted and affirmed by the said Appeal Board). As is usual, the learned judge ordered costs of the application against the appellant.

The motion was filed pursuant to s. 24(1) of the Arbitration Act 1952 (Act 93). It reads:

> 24. (1) ...
>
> (2) where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

The ground on which the award was set aside by the learned judge was because he found that there was an error of law apparent on the face of the award relying on the case of *AG of Singapore v. Wong Sai Cheng* [1980] 1 MLJ 131, where at p. 135 Wee Chong Jin CJ said:

> In our judgment the failure of the arbitrator to construe the contract, in particular clause 32(b) of the conditions of contract, and to consider all the facts and circumstances of the case, in particular the fact that the original completion date had been extended and it was within the contemplation of the parties that the time for completion was not of the essence of the contract amount to an error of law apparent on the face of the award.

In the circumstances we need to examine the facts before the arbitrators and the relevant terms of the contract entered into between the parties in order to determine whether the learned judge erred in setting aside the award.

In October 1993, the respondent agreed to sell to the appellant, a company incorporated in Pakistan, and the appellant agreed to buy 6000 metric tons of RDB (refined, bleached, deodorised) palm oil.

The parties on 21 October 1993 executed the following three contracts based on the PORAM standard FOB contract format:

(a) contract no. 93 11 S 79 for delivery in November 1993 of 2000 metric tons of RDB palm oil;

(b) contract no. 93 12 S 80 for delivery in December 1993, of 2000 metric tons of RDB palm oil;

(c) contract no. 94 01 S 81 for delivery in January 1994, of 2000 metric tons of RDB palm oils.

The appellant opened on 23 October 1993 and 14 November 1993, Irrevocable Letter of Credit respectively for the first two contracts, that is, contract no. 93 11 S 79 and contract no. 93 12 S 80 thus requiring the respondent to arrange for shipment of the first two quantities of 2000 metric tons of RDB palm oil each. The appellant did not open an Irrevocable Letter of Credit for the third contract, that is, no. 94 01 S 81 and hence the respondent was not required to program shipping for the third batch of 2000 metric tons of RDB palm oil.

Pursuant to the first contract, the respondent duly made partial shipments (agreed to by the appellant) of:

(a) 1000 metric tons of RDB palm oil on 25 October 1993; and

(b) 544.7838 metric tons of RDB palm oil on 6 November 1993.

Thus, the amounts due and payable to the respondent would be:

(a) USD356,000 in respect of the first shipment of 1000 metric tons of RDB palm oil on 26 January 1994; and

(b) USD 193,943.03 in respect of the second shipment of 544.738 metric tons of RDB palm oil on 3 February 1994.

The respondent was unable to ship the balance and on 15 January 1994, the appellant agreed to extend the shipment date to:

(a) 28 February 1994 for the balance due under the first contract; and

(b) 20 March 1994 for the second contract.

However, on 25 January 1994 ie, more than a month before the expiry of the extended shipment (as agreed by the appellant), the appellant, without notice to the respondent, took out an injunction in Azed Kashmir to stop payment by the bank in Singapore of all monies due to the respondent. Unfortunately, it was too late to stop payment of USD 356,000 in respect of the first shipment of 1000 metric tons of DRB palm oil but payment of USD 193,943.03 in respect of the second shipment of 544.7838 metric tons of DRB palm oil was stopped.

It appears that the appellant insisted on the respondent making shipment of the balance of DRB palm oil despite not paying the respondent the said sum of USD 193,943.03.

The respondent took the stand that the appellant terminated the contract and hence refused to make any further shipments to the appellant.

The USD 193,943.03 was finally released to the respondent on 16 March 1994, about 41 days after its due date!

We have examined the record of the proceedings of the arbitrators wherein they concluded:

> We therefore find in favour of the Claimants and that the contracts should be closed out on 2.5.1994, the first business day, after the expiry of the last shipment period, April 1994, as per the Respondents' proposal of 19.2.1994.

They then proceeded to award damages in the sum of USD 712,609.14 and costs against the respondent.

The said Appeal Board concurred with the views of the arbitrators that the respondent was at fault and the contracts should be closed out on 2 May 1994 and upheld the arbitrators' award.

It is not disputed that the appellant agreed to the partial delivery of the RDB palm oil, a variation of the terms of the contracts and to the extension of time for the completion of the delivery of the RDB palm oil. However, before the expiry of the extended time, the appellant stopped payment of the partial delivery of the RDB palm oil to the respondent by obtaining an injunction in Pakistan to that effect.

It would appear from the record of the proceedings before the arbitrators and the said Appeal Board, they found the respondent was at fault and ruled the contracts should be closed out on 2 May 1994. We do not quite understand what is meant by this finding. Possibly, the contracts should be completed on 2 May 1994 and hence held the respondent was at fault, that is, in breach of the contracts. Be that as it may, in our view, the arbitrators as well as the said Appeal Board failed to consider or adequately consider the legal significance of the appellant's conduct in revoking the Irrevocable Letter of Credit given that there was an extension of time for the respondent to fulfill its obligations to ship and that time had not lapsed. In other words, it was within the contemplation of the parties that time for completion was not of the essence of the contracts.

We agree with the contention of counsel for the respondent that the appellant by stopping the payment had committed a breach and had repudiated the contracts and the respondent had accepted the repudiation. Counsel for the appellant, on the other hand, contended that even if the non-payment was a repudiation (which is denied) there was no acceptance of it. This is premised on the claim by the appellant that the respondent continued to promise performance after the non-payment. However, this promise of the respondent as appears from its letter dated 2 February 1994 to the appellant, would be on new terms arising from the problem of payment encountered earlier by the respondent. There was no response from the appellant. Thereafter the respondent stopped further delivery of the RDB palm oil to the appellant which resulted in the reference of the dispute to the arbitrators. The conduct of the respondent, in our view, pointed to the acceptance of the repudiation by the appellant. We would reiterate that the issue of whether there was a repudiation of the contracts or not was not considered or adequately considered by the arbitrators or the said Appeal Board. Similarly the issue of time for completion of the contracts is no longer of the essence of the contracts was not addressed or adequately addressed by the arbitrators or the said Appeal Board.

In the circumstances and for the reasons stated, we do not find any errors of law and fact committed by the learned judge in making an order setting aside the award of the arbitrators. The learned judge was correct in following the principle laid down in *AG of Singapore v. Wong Sai Cheng, supra*, and applying it to the facts of this case.

The appeal is dismissed with costs and the order of the learned judge is affirmed. Deposit to go to the respondent towards its taxed costs.

In view of the retirement of Shaik Daud Md. Ismail JCA, this judgment is given with the concurrence of Denis Ong Jiew Fook, JCA pursuant to s. 42 of the Courts of Judicature Act 1964.